No. 48466-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DAVID FOX, Appellant.

Appeal from the Superior Court of Cowlitz County
The Honorable Marilyn Haan
No. 14-1-00645-1

BRIEF OF APPELLANT DAVID FOX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Other State Cases

Federal Cases

Constitutional Provisions

Rules

Other

I. ASSIGNMENTS OF ERROR

1. The Cowlitz County Prosecuting Attorney's Office's Representation in This Case, When There Was a Conflict of Interest, Was Error.
2. The Improper Opinion Testimony Regarding Mr. Fox's Guilt, Was Error.
3. The Prosecutor's Improper Argument, Using Improper Opinion Testimony Regarding Mr. Fox's Guilt, Was Error.
4. Defense Counsel's Failure to Object to and/or or Move to Disqualify the Cowlitz County Prosecuting Attorney's Office, Was Error.
5. Defense Counsel's Failure to Object to Inadmissible Opinion Testimony Regarding Mr. Fox's Guilt, Was Error.
6. Defense Counsel's Failure to Object to the State's Improper Closing Argument, Using Improper Opinion Testimony Regarding Mr. Fox's Guilt, Was Error.
7. Defense Counsel's Failure to Object to Inadmissible Hearsay, Was Error.
8. The Denial of a Fair Trail, Due to Cumulative Error, Was Error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the elected prosecuting attorney originally represented the defendant in a case and then was elected as the prosecuting attorney while the case was still pending, is the entire prosecuting attorney's office disqualified from prosecuting the defendant?
2. Does a police officer improperly give an opinion on a defendant's guilt when he does not hear the conversation between the defendant and a confidential informant (CI) and does not see money or drugs exchanged, but testifies that he observed a drug deal?
3. Is it prosecutorial misconduct for the State to argue in closing arguments that the officer believed he observed a drug deal, because the argument includes improper opinion testimony regarding the defendant's guilt?
4. Is it ineffective and unreasonable for defense counsel to fail to object to and/or move to disqualify the entire prosecuting attorney's office when the elected prosecutor originally represented the defendant in the same case?
5. Is it ineffective and unreasonable for defense counsel to fail to object to an officer testifying that he observed a drug

deal, when the officer's testimony is an improper opinion on the defendant's guilt?

6. Is it ineffective and unreasonable for defense counsel to fail to object to the State's closing argument, when the State improperly argues that the officer believed he witnessed a drug deal, because the State is arguing improper opinion testimony regarding the defendant's guilt?
7. Is it ineffective and unreasonable for defense counsel to fail to object to inadmissible hearsay when an officer testifies that a CI told him that the defendant agreed to sell him drugs?

III. STATEMENT OF THE CASE

1. Conflict of Interest.

Ryan P. Jurvakainen and Tom Ladouceur were both employed by the Cowlitz County Office of Public Defense, the firm that represented Mr. Fox in this matter. (CP 158-61) Mr. Jurvakainen personally represented Mr. Fox in this case; he appeared at Mr. Fox's omnibus hearing on October 17, 2014 and signed Omnibus Application by Defendant. (CP 10-11).

While this case was pending, Mr. Juvakainen was elected as the Cowlitz County Prosecuting Attorney. (CP 160). On May 20, 2015, as

the Cowlitz County Prosecuting Attorney, Mr. Jurvakainen filed an amended information in this case. (CP 12). Mr. Jurvakainen is listed as the attorney on the State's Proposed Jury Instructions on Mr. Fox's original trial and the re-trial. (CP 17, 80).

2. Procedural History.

Mr. Fox was charged with one count of delivery of a controlled substance within 1000 feet of a school bus stop. (CP 1-2). This case involved a controlled buy, with a confidential informant. (RP 5-21-15 p. 39-40, 87).

This case first proceeded to trial on May 21, 2015. (RP 5-21-15 p. 1). During the first trial, the State did not call the confidential informant as a witness. The first trial ended in a mistrial, after the jury could not reach a unanimous verdict. (RP 5-22-15 p. 85-87).

The second trial began on December 17, 2015. (RP 12-17-15 p. 69). Mr. Fox had new counsel for his second trial.

3. Facts.

On April 10, 2013, Detective Epperson and Officer Sawyer met with their confidential informant (CI), John E. Canales, to do a controlled buy. (RP 12-17-15 p. 87). The defendant, David Fox, was the target. (RP 12-17-15 p. 40).

Mr. Canales, the CI, approached the officers, through his attorney,

about being a CI, after he had been charged with unlawful possession of a controlled substance in a school zone. (RP 12-17-15 p. 106). Mr. Canales' charge had occurred at his residence and involved methamphetamine. (RP 12-17-15 p. 110).

Mr. Canales violated the terms of his contract to be a CI after getting a second drug charge. (RP 12-17-15 p. 108). He was violated and went to prison. (RP 12-17-15 p. 88).

This was Mr. Canales' first, and only buy as a CI. (RP 12-17-15 p. 113-14). Mr. Canales did not perform any reliability buys prior to this incident. (RP 12-17-15 p. 103-04, 112-13)

> Q. Okay. Did you guys use an audio recording device in this case?
>
> A. We did not.
>
> Q. Why did you not use an audio recording device in this case?
>
> A. So, one, to get to that -- to get to the audio recording, you have to meet a certain standard. And at the time, this was -- this was Mr. Canales's first buy -- first buy on Mr. Fox, so we didn't have enough. We've got to do a -- basically, like a warrant. We've got to do a report, and then that report's got to go to our Captain, who signs it and gives us authorization, and then it returns and goes to a Judge. So, it's a time-consuming process that we didn't even have the, I guess, probable cause at that point to record a conversation.

(RP 12-17-15 p. 103-04).

Q. And I didn't see anything in your report, either, in terms of the reliability of Mr. Canales as an informant.

A. As far as? I mean –

Q. Had you worked -- had you worked with him as an informant before?

A. He -- that was mentioned earlier. That was -- this buy with David Fox was his first buy.

(RP 12-17-15 p. 112-13).

While he was a CI, Mr. Canales was never given a drug test. (RP 12-17-15 p. 112).

The officers met with the CI at a mall parking lot searched him, and his bike, and found several envelopes of mail, but no contraband. (RP 12-17-15 p. 88-90). The officers did not do a strip search. (RP 12-17-15 p. 118). The officers gave the CI $55 in pre-recorded buy money. (RP 12-17-15 p. 89).

Officer Sawyer testified at trial about a conversation that Mr. Canales and Mr. Fox had:

Q: Okay. And why did you give him fifty-five dollars?

A: Because that's what he had made contact with Mr. Fox and had agreed to sell him fifty-five dollars worth of methamphetamine.

(RP 12-17-15 p. 90). However, the officers never monitored any phone calls between Mr. Canales and Mr. Fox to independently establish the

veracity of this information. (RP 12-17-15 p. 114).

The CI then rode his bike to his house; the officers followed. (RP 12-17-15 p. 92). The CI's house, a known dope house, and the location of his prior charge, was the location for the controlled buy. (RP 12-17-15 p. 133). The CI's house was within 1000 feet of a school bus stop. (RP 12-17-15 p. 188, 192-93). The officers did not choose the location. (RP 12-17-15 p. 142). The property was not searched prior to the controlled buy. (RP 12-17-15 p. 132).

The CI waited in his front yard, working on his bike. (RP 12-17-15 p. 97). Mr. Fox walked to the CI's house. (RP 12-17-15 p. 97). The officer's observed the CI and Mr. Fox have a conversation, but could not hear the conversation. (RP 12-17-15 p. 98). Detective Epperson was asked about the conversation:

> Q: At any point, did you see either one of them do anything other than talk?
>
> A: yeah, they both reach into their pockets and then they do a hand-to-hand exchange, which looked like a drug deal.

(RP 12-17-15 p. 157). In closing, the State repeated the testimony:

> "He was standing here, side by side, and when [defense counsel] asked him: What does that look like to you? He says: Like a drug deal. That's what the officer – that's what Detective Epperson saw.

(RP 12-18-15 189).

According to Officer Sawyer, the CI reached into the pocket where he had envelopes, Mr. Fox reached into his coin pocket, their hands touched, and then they separated. (RP 12-17-15 p. 98).

Detective Epperson videotaped the interaction between the CI and Mr. Fox. (RP 12-17-15 p. 156). On the video, you cannot see what Mr. Fox hands to the CI. (RP 12-17-15 p. 176). On the video, you cannot see the CI take any money out of his pocket. (RP 12-17-15 p. 175).

After Mr. Fox left, the officers met Mr. Canales, the CI, back at the mall. (RP 12-17-15 p. 128). He had methamphetamine on him and no money. (RP 12-17-15 p. 182, RP 12-18-15 p. 14).

The State did not call Mr. Canales as a witness in the first or second trial. However, the defense called him as a witness in the second trial.

Mr. Canales testified that he thought Mr. Fox may have ratted him out to the police, resulting in him getting charged. (RP 5 p. 22). He met with the police to try to "work off" that charge. (RP 12-18-15 p. 22).

Mr. Canales testified that he met with the officers, called Mr. Fox, and then he bought methamphetamine from Mr. Fox with the pre-recorded buy money. (RP 12-18-15 p. 28, 30, 44). He testified that he was not high that day and did not have meth in his socks. (RP 12-18-15 p. 31, 34). He had previously told a defense investigator that he was high and hid meth in

his socks. (RP 12-18-15 p. 151). Mr. Canales testified that he was talking about a different day, the defense investigator testified that Mr. Canales had told him that he was high and had meth in his sock the day of this incident, after viewing the video of this incident. (RP 12-18-15 p. 122-23, 151). Mr. Canales testified that he might have told Mr. Fox to bring him a wrench or a bolt or something, but couldn't remember. (RP 12-18-15 p. 120).

Mr. Fox testified that he does mechanical work for friends. (RP 12-18-15 p. 128). He knows the CI, Mr. Canales, because he is a friend of a friend. (RP 12-18-15 p. 134). Mr. Fox had previously sold Mr. Canales a generator. (RP 12-18-15 p. 135). On the date of this incident, Mr. Canales called him and asked for a bearing for his bike. (RP 12-18-15 p. 136). It is an inexpensive part, maybe $1, and Mr. Fox had one. (RP 12-18-15 p. 140). So, he walked to Mr. Canales' house, gave him the bearing, waved goodbye and left. (RP 12-18-15 p. 144).

I. ARGUMENT

1. The Cowlitz County Prosecuting Attorney's Office Should Have Been Disqualified Because the Elected Prosecuting Attorney, Who Previously Represented Mr. Fox in This Case, Had Conflict of Interest.

Because the elected prosecutor previously represented Mr. Fox in this matter, the entire Cowlitz County Prosecuting Attorney's Office should have been disqualified.

"[Appellate courts] review *de novo* the trial court's decision not to disqualify the prosecutor." *State v. Greco*, 57 Wash. App. 196, 200, 787 P.2d 940, 942 (1990) (Div. II), citing *State v. Stenger*, 111 Wash.2d 516, 521–22, 760 P.2d 357 (1988).[1]

"[A] prosecuting attorney is disqualified from acting in a criminal case if the prosecuting attorney has previously personally represented . . . an accused with respect to the offense charged." *State v. Stenger*, 111 Wash. 2d 516, 520, 760 P.2d 357, 359 (1988), citing *Young v. State,* 177 So.2d 345, 346 (Fla.Dist.Ct.App.1965); *State v. Leigh,* 178 Kan. 549, 552, 289 P.2d 774 (1955); *Burkett v. State,* 131 Ga.App. 662, 663, 206 S.E.2d

[1] However, in other cases, the decision on whether or not to disqualify an attorney has been reviewed under the abuse of discretion standard. *See State v. Schmitt*, 124 Wash. App. 662, 666, 102 P.3d 856, 858 (2004) (Div. II). Division I held that appellate courts review whether a conflict exists de novo, but review a decision not to disqualify an attorney for an abuse of discretion. *State v. Orozco*, 144 Wash. App. 17, 20, 186 P.3d 1078, 1079-80 (2008) (Div. I).

848 (1974); RPC 1.9(a).[2] A prosecutor who previously represented the defendant "has likely acquired some knowledge of facts upon which the prosecution is predicated." *Stenger*, 111 Wash. 2d at 520-21.

Generally, when an attorney is disqualified, that attorney's office is also disqualified. RPC 1.10(a). In some cases, the lawyer can be screened to prevent any involvement in the case, allowing others in the firm to participate in the case. RPC 1.10(e). When the disqualified lawyer is a deputy prosecuting attorney who is appropriately screened, disqualification of the entire office is not necessary. *See Stenger,* 111 Wn.2d at 522–23; *State v. Bland,* 90 Wn. App. 677, 680, 953 P.2d 126 (1998); *State v. Schmitt*, 124 Wn. App. 662, 666, 102 P.3d 856, 859 (2004). However, when the elected prosecutor personally represented the defendant in the same case, the entire prosecuting attorney's office should be disqualified. *Stenger*, 111 Wash. 2d at 522.

> Where the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has previously personally represented the accused in the same case . . . the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed.

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[2] "A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing." RPC 1.9(a).

Id. Also, according to a Washington State Bar Association advisory opinion, "[t]he entire prosecuting attorney's office is disqualified when . . . the prosecuting attorney personally represented the defendant in the same or a substantially related proceeding . . . ." Advisory Opinion 1773 (WSBA 1997)[3].

The court in *Stenger* noted that in some cases, like when the prosecutor is disqualified based on an unrelated case, it may be possible to screen the elected prosecutor. *Id.* However, the court did not discuss any exception that would allow the prosecuting attorney's office to continue to represent a defendant under the circumstances in this case.

In this case, the elected prosecuting attorney and chief criminal deputy for the Cowlitz County Prosecutor's Office, who both previously worked at the Cowlitz County Public Defender's Office, both acknowledged that they are disqualified from acting in this case because they personally, or their office, previously represented Mr. Fox in this case. Mr. Jurvakainen, the elected prosecutor, personally represented Mr. Fox in this case. Therefore, screening Mr. Jurvakainen and Mr. Ladouceur was insufficient. The entire Cowlitz County Prosecutor's Office should have been disqualified in this case. Failure to disqualify the entire prosecutor's office was error and an abuse of discretion. Therefore,

[3] Available at http://mcle.mywsba.org/IO/print.aspx?ID=837.

Mr. Fox's conviction should be reversed and this matter remanded for a new trial.

2. Mr. Fox Was Denied His Right to a Fair Trial When the Officer Improperly Testified Regarding His Opinion on Mr. Fox's Guilt.

a. Improper Opinion Testimony Regarding Guilt is a Manifest Error Effecting a Constitutional Right and Can Be Considered for the First Time on Appeal.

Manifest errors effecting constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3). When a police officer makes an explicit or almost explicit comment that he believes that the defendant is guilty, the error can be raised for the first time on appeal. *See State v. Kirkman*, 159 Wn.2d 918, 936-7, 155 P.3d 125 (2007); *see also State v. Dolan*, 118 Wn.App. 323, 73 P.3d. 1011 (2003) (improper testimony of CPS worker and police officer that they didn't believe the mother was responsible for injuries to child, implying that the defendant was responsible, allowed to be considered for the first time on appeal).

Improper opinion testimony regarding a defendant's guilt affects his or her right to a fair trial and a trial by jury. "The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington State Constitution." *In re Glasmann*, 175 Wash. 2d 696, 703-04, 286 P.3d 673, 677 (2012), *citing Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct.

1691, 48 L.Ed.2d 126 (1976); *State v. Finch,* 137 Wash.2d 792, 843, 975 P.2d 967 (1999); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV. Furthermore, the right to have factual questions decided by the jury is crucial to the right to trial by jury. WASH. CONST. art I, §§ 21, 22, U.S. CONST. amend. VII. "The role of the jury is to be held 'inviolate' under Washington's constitution." *State v. Montgomery*, 163 Wash. 2d 577, 590, 183 P.3d 267, 273 (2008). One factor courts consider in determining whether a constitutional issue may be raised for the first time on appeal is the prejudice to the defendant. *See State v. Montgomery*, 163 Wn.2d 577, 595-6, 183 P.3d 267 (2008).

In this case, the officer testified that he witnessed a drug deal. This was extremely prejudicial because this was a circumstantial case, the officers could not see whether drugs or money were exchanged, the CI had admitted bias because he believed Mr. Fox set him up previously and had not been established as reliable, and the first trial resulted in a hung jury. The violation of Mr. Fox's right to a fair trial by jury is a manifest constitutional right that should be considered for the first time on appeal.

b. The Officer's Improper Opinion Testimony Regarding Mr. Fox' Guilt Denied Mr. Fox His Constitutional Right to a Fair Trial by Jury.

"Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the

defendant's guilt, whether by direct statement or by inference." *State v. Farr-Lenzini*, 93 Wash. App. 453, 459-60, 970 P.2d 313, 318 (1999), citing *State v. Black,* 109 Wash.2d 336, 348, 745 P.2d 12 (1987); *State v. Garrison,* 71 Wash.2d 312, 315, 427 P.2d 1012 (1967). Such impermissible opinion testimony about a defendant's guilt may constitute reversible error because it violates the defendant's constitutional right to a jury trial, which includes independent determination of the facts by the jury. *Id.*; State *v. Kirkman*, 159 Wash. 2d at 927.

Washington courts, as well as federal courts, have long recognized the inherent danger in admitting opinion testimony of law enforcement officers. *State v. Carlin*, 40 Wn. App. 698, 703, 700 P.2d 323 (1985) (statement made by a government official or law enforcement officer is more likely to influence the fact finder), overruled on other grounds by *City of Seattle v. Heatley,* 70 Wash.App. 573, 854 P.2d 658 (1993); *United States v. Gutierrez*, 995 F.2d 169, 172 (9th Cir. 1993) (statements of law enforcement officers often carry "an aura of special reliability and trustworthiness"), quoting *United States v. Espinosa*, 827 F.2d 604, 613 (9th Cir. 1987); *State v. Demery*, 144 Wash. 2d 753, 765, 30 P.3d 1278, 1285 (2001) (police officer's testimony carries an "aura of reliability"); *State v. Barr*, 123 Wn. App. 373, 381, 98 P.3d (2004) (law enforcement

officer's opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial).

While a police officer may be able to give expert opinion testimony regarding how drug transactions occur and identifying evidence that may be used in drug transactions, it is improper for an officer to give a conclusory opinion that based on the evidence, the defendant was involved in "street level distribution of cocaine." *States v. Boissoneault*, 926 F.2d 230, 232-33 (2d Cir. 1991); *see also* ER 702. Federal courts have "repeatedly expressed [their] discomfort with expert testimony in narcotics cases that not only describes the significance of certain conduct or physical evidence in general, but also draws conclusions as to the significance of that conduct or evidence in the particular case." *Id.* at 233. Such conclusory evidence is not admissible under ER 702[4] because it is does not assist the trier of fact. *Id.* Once an officer testifies to the likely drug-transaction significance of the evidence, the jury can draw its own conclusions. *Id.* Therefore, opinion testimony on the ultimate issue that a drug transaction occurred is not admissible. *Id.*

Furthermore, "police officers' opinions on guilt have low probative value because their area of expertise is in determining when an arrest is

[4] "If scientific, technical, or other specialized knowledge *will assist the trier of fact* to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702 (emphasis added).

justified, not in determining when there is guilt beyond a reasonable doubt." *State v. Montgomery*, 163 Wash. 2d 577, 595, 183 P.3d 267, 276 (2008).

In this case, Detective Epperson was asked about what he observed between Mr. Canales and Mr. Fox:

> Q: At any point, did you see either one of them do anything other than talk?
>
> A: yeah, they both reach into their pockets and then they do a hand-to-hand exchange, which looked like a drug deal.

(RP 12-17-15 p. 157). In closing, the State repeated the testimony:

> "He was standing here, side by side, and when [defense counsel] asked him: What does that look like to you? He says: Like a drug deal. That's what the officer – that's what Detective Epperson saw.

(RP 12-18-15 189).

The officer testified to his opinion that Mr. Canales and Mr. Fox completed a drug deal, which is the very issue the jury had to decide in this case. In essence, the officer testified that Mr. Fox was guilty. This testimony was improper and violated Mr. Fox right to a fair trial and a trial by jury. This testimony was extremely prejudicial because it came from a police officer and because of the circumstantial nature of this case. The officers never listened to any conversations between Mr. Canales and Mr. Fox, they did not actually see money or drugs exchanged, Mr. Fox was not

immediately detained, so it is unknown whether or not he had buy money on him, the officers did not search Mr. Canales' property prior to this incident, Mr. Canales had not been established as a reliable informant, Mr. Canales admitted to bias as he believed that Mr. Fox had previously set him up, Mr. Fox testified that he met Mr. Canales to bring him a bike part, and the first trial ended in a hung jury. The prejudice was compounded when the State repeated in closing argument that the officer believed this was a drug deal. Given the prejudicial nature of the testimony, this matter should be reversed and remanded for a new trial.

3. Prosecutorial Misconduct.

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced her defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983). A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125

Wn.App. 895, 106 P.3d 827 (2005). "However, if the alleged misconduct is found to directly violate a constitutional right . . . then 'it is subject to the stricter standard of constitutional harmless error.'" *State v. French*, 101 Wn. App. 380, 385-386, 4 P.3d 857 (2000) (internal citations omitted).

It is improper for a prosecutor to argue improper opinion testimony to the jury. Improper opinion testimony regarding guilt violates a defendant's constitutional right to have factual issues decided by a jury. *Jungers*, 125 Wn.App. at 901.

In *Jungers*, the defendant was charged with unlawful possession of methamphetamine. *Jungers*, 125 Wn.App. at 897. During the trial, the officer improperly testified that he believed the drugs belonged to the defendant and regarding the credibility of witnesses. *Id.* at 902. That testimony was stricken. *Id.* However, in closing argument, the State improperly argued the officer's opinion to the jury. *Id.* at 903-04. This Court held that the State's argument was improper and, because credibility was critical to the defense, constituted reversible error. *Id.* at 905-06.

As argued above, the officer gave improper opinion testimony regarding Mr. Fox's guilt, in violation of Mr. Fox's constitutional rights to a fair trial and a trial by jury. This entire case hinged on whether Mr. Canales and Mr. Fox engaged in a drug deal, or whether Mr. Fox handed

Mr. Canales a part for his bike. Mr. Canales testified that he gave Mr. Fox money in exchanged for drugs, but he also admitted a bias against Mr. Fox because he believed that Mr. Fox previously set him up and he had previously told a defense investigator that he had meth in his socks during the transaction, although on the stand he testified that he was talking about a previous day. The State's argument was clearly improper. And, given the facts of this case, the argument was flagrant and ill-intentioned and could not have been cured by a limiting instruction. Furthermore, the error effected a constitutional right, so it this Court should apply the constitutional harmless error standard. Under the constitutional harmless error standard, the State cannot prove beyond a reasonable doubt that the error did not affect the verdict in this case. Therefore, this matter should be reversed and remanded for a new trial.

4. Mr. Fox Received Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d

322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Sutherbv.* 165 Wash.2d 870, 883, 204 P.3d 916 (2009).

a. *Counsel Was Ineffective for Failing to Move to Disqualify the Entire Cowlitz County Prosecuting Attorney's Office.*

As discussed above, the elected prosecutor for Cowlitz County had originally represented Mr. Fox in this case. Therefore, the entire Cowlitz County should have been disqualified.

It does not appear that defense counsel ever objected to the Cowlitz County Prosecuting Attorney's Office prosecuting this case. Failure to object and/or move to disqualify the entire prosecutor's office was clearly unreasonable in this case, where the elected prosecutor had previously represented Mr. Fox in this case.

b. *Counsel Was Ineffective for Failing to Object to Inadmissible Opinion Testimony Regarding Mr. Fox's Guilt.*

As discussed above, the officer improperly testified to his opinion that Mr. Fox was guilty when he testified that he witnessed what looked like a drug deal. For the reasons stated above, the testimony was improper and highly prejudicial. Therefore, defense counsel's failure to object was unreasonable.

c. *Counsel Was Ineffective for Failing to Object to the State's Improper Argument Using Improper Opinion Testimony Regarding Mr. Fox's Guilt.*

As discussed above, the State improperly argued to the jury that the officer believed he observed a drug deal. For the reasons stated above, the testimony was improper and highly prejudicial. Therefore, defense counsel's failure to object was unreasonable.

d. *Counsel Was Ineffective for Failing to Object to Inadmissible Hearsay.*

Defense counsel failed to object to inadmissible hearsay statements, implicating Mr. Fox.

"Hearsay" is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is inadmissible unless there is an exception. ER 802. "In instances of multiple hearsay, each

level of hearsay must be independently admissible." *State v. Alvarez-Abrego*, 154 Wash. App. 351, 366, 225 P.3d 396, 401 (2010), citing ER 805.

In *Martinez*, the defendant was charged with unlawful possession of cocaine with intent to deliver. *State v. Martinez*, 105 Wn. App. 775, 779, 20 P.3d 1062 (2001), overruled on other grounds by S*tate v. Rangel-Reyes*, 119 Wash. App. 494, 81 P.3d 157 (2003). There was a confidential informant, who did not testify at trial. *Id.* At trial, the court did not allow the officer to testify to direct quotes from the CI, but did allow the officer to testify regarding information that they had learned from the CI. *Id.* at 779-80. This back-door approach to admitting inadmissible hearsay is not allowed. *Id.* at 782. "Inadmissible evidence is not made admissible by allowing the substance of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify." *Id.*, citing *United States v. Sanchez,* 176 F.3d 1214, 1222 (9th Cir.1999); s*ee also State v. Johnson*, 61 Wn. App. 539, 546, 811 P.2d 687 (1991) (detective's testimony that, based on an informant's statement, he had reason to suspect defendant was inadmissible hearsay).

In this case, Officer Sawyer testified at trial about a conversation that Mr. Canales and Mr. Fox had:

Q: Okay. And why did you give [Mr. Canales] fifty-

five dollars?

A: Because that's what he had made contact with Mr. Fox and had agreed to sell him fifty-five dollars worth of methamphetamine.

(RP 12-17-15 p. 90). However, the officers never monitored any phone calls between Mr. Canales and Mr. Fox. (RP 12-17-15 p. 114). Therefore, the officer was testifying that Mr. Canales told him that Mr. Fox had agreed to sell him $55 worth of methamphetamine. While Mr. Fox's statements may be admissible as an admission against a party opponent under ER 801(d)(2), there is no hearsay exception that would apply to Mr. Canales' statement to the officer. Furthermore, the State did not intend to call Mr. Canales as a witness. And, when Mr. Canales testified as a defense witness, he did not testify about a conversation with Mr. Fox where Mr. Fox agreed to purchase $55 worth of methamphetamine. Under these circumstances, counsel's failure to object to the inadmissible hearsay was clearly unreasonable.

e. *Mr. Fox Was Prejudiced by the Ineffective Assistance of Counsel.*

Defense counsel failed to move to disqualify the prosecutor's office, failed to object to the officer's improper opinion testimony that he observed a drug deal, and thus, Mr. Fox was guilty, failed to object to the State's improper use of the officer's opinion on Mr. Fox's guilt in closing

argument, and failed to object to inadmissible hearsay regarding a confession. Counsel's failure to object to each of these was extremely prejudicial to Mr. Fox, especially given that the officers did not actually see any drugs or money exchanged and the credibility of the CI was at issue.

5. The Cumulative Error Denied Mr. Fox a Fair Trial.

Even if the individual errors during trial do not require reversal, reversal is required if the cumulative effect of the errors denied the defendant a fair trial. See, e.g., *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV.

In this case, Mr. Canales contacted police, though his attorney, to work off a drug charge. At the time, he believed that Mr. Fox had set him up and was responsible for him being charged. Mr. Canales suggested Mr. Fox as the target and suggested his house, a known drug house, as the location. Officers never listened to any conversations between Mr. Canales and Mr. Fox, they did not search Mr. Canales' property, where the controlled buy was to take place, they never gave Mr. Canales a drug test,

and Mr. Canales never completed any reliability buys prior to this incident.

Officers observed Mr. Fox and Mr. Canales talking, exchange something, and then separate. The officers could not hear the conversation and did not see any money or drugs exchanged. Mr. Fox testified that he brought Mr. Canales a part for his bike. Mr. Canales testified that Mr. Fox gave him drugs and he gave Mr. Fox money. Mr. Canales had previously told a defense investigator that he had been high the day of the transaction and had meth in his socks that the officers did not find. Mr. Fox was not detained at the time, so the officers were unable to determine if he had received the pre-recorded buy money or not.

Furthermore, the first time this case went to trial, the jury was unable to reach a unanimous verdict and a mistrial was declared.

Given the facts of this case, and the cumulative effect of the errors discussed above denied Mr. Fox his right to a fair trial and likely effected the outcome in this case. Therefore, this matter should be reversed and remanded for a new trial.

6. This Court Should Not Impose Appellate Costs Because Mr. Fox is Indigent and Unable to Pay.

This Court has discretion on whether or not to impose appellate costs in a criminal case. *State v. Sinclair*, 192 Wash. App. 380, 389-90, 367 P.3d 612, 616 (2016); *see also* RAP 14.2[5], 14.1(c)[6].

> As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in Blazina—e.g., "increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration." *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

Sinclair, 192 Wash. App. at 391-92, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider "important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay." *Blazina*, 182 Wn.2d at 838. In

[5] "A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, *unless the appellate court directs otherwise in its decision terminating review*." RAP 14.2 (emphasis added).
[6] "If the court determines costs in its opinion or order, a commissioner or clerk will award costs in accordance with that determination." RAP 14.1(c).

addition, if a person is considered indigent, "courts should seriously question that person's ability to pay . . . ." *Id.*

A trial court's finding of indigency will be respected unless there is good cause not to do so. *Sinclair*, 192 Wash. App. at 393; *see also* RAP 15.

In this case, Mr. Fox was found indigent and counsel was appointed for his trial, as well as this appeal. (CP 152-54). In addition, the trial court waived all non-mandatory legal financial obligations (RP 12-24-15 p. 31, CP 131). At trial, Mr. Fox testified that he receives Social Security Disability and does odd jobs for friends in his back yard. (RP 12-18-15 p.128).

In this case, Mr. Fox was sentenced to 54 months in prison. (RP 12-24-15 p. 31, CP 129). It is extremely unlikely that Mr. Fox will be able to pay any appellate costs after his release from prison. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Mr. Fox does not substantially prevail.

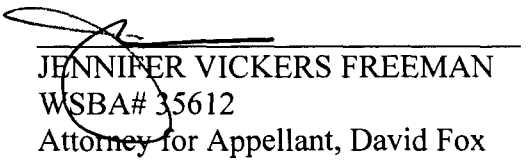
I. CONCLUSION

In conclusion, there was a conflict of interest and the entire Cowlitz County Prosecuting Attorney's Office should have been disqualified. In addition, Mr. Fox was denied his right to a fair trial due to improper hearsay, improper opinion testimony regarding his guilt, the

prosecutor's misconduct, ineffective assistance of counsel, and the cumulative effect of these errors. For all the reasons stated above, this matter should be reversed and remanded for a new trial.

Dated this 14th day of July, 2016.

Respectfully Submitted,



JENNIFER VICKERS FREEMAN
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Attorney for Appellant, David Fox

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, vs. DAVID FOX, Appellant.	)	NO. 48466-8-II CERTIFICATE OF SERVICE

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Randall Sutton
Kitsap County, DPA
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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

David Fox
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Mary E. Benton

Signed July 14, 2016 at Tacoma, Washington.

PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Mary Benton

Signed July 15, 2016 at Tacoma, Washington.

PIERCE COUNTY DEPARTMENT OF ASSIGNED COUNSEL

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